



IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

NO. **79-548**

JAMES E. DIZON,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES E. DIZON

201 S. McCarty Drive
Beverly Hills, CA.
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In Propria Persona



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TO THE HONORABLE, THE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

James E. Dizon, the petitioner
herein (petitioner), prays that a writ
of certiorari issue to review a judg-
ment of the United States Court of
Appeals for the Ninth Circuit entered

on May 18, 1979.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit entered its opinion affirming the conviction of the Petitioner on May 18, 1979. A copy of the Opinion is attached hereto as Appendix "A".

A Petition for Rehearing with a Suggestion for a Rehearing En Banc was denied by the United States Court of Appeals on September 4, 1979. A copy of the Order denying the Petition and rejecting the Suggestion for Rehearing En Banc is attached hereto as Appendix "B".

JURISDICTION

On May 18, 1979 the United States Court of Appeals entered judgment affirming the conviction of the Petitioner of conspiracy to use the mail in employing a scheme to defraud a client of an investment adviser, and to convert funds of a registered investment company. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The conduct of the United States Government was highly reprehensible, and a fair reading of the evidence indicates that (a) the Government did grant the defendant immunity, and (b) the Government breached its immunity agreement with the defendant when he was prosecuted. The Government must keep its promise since the trial court was clearly erroneous in its finding and the evidence must be reweighed in this case. Promises made by the Government and agents of the Government such as in this case, the Securities and Exchange Commission and the United States Attorneys Office must be kept. This matter must be of vital concern to our highest Court in the land.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional Provision involved in this situation is the Due Process Clause of the Fifth Amendment. It is the position of the defendant he was was convicted in this case after the United States Government failed to

honor its promise of immunity, and, therefore, he was denied due process of law.

STATEMENT OF THE CASE

In 1973, the defendant retained the law firm of Latham & Watkins, specifically George A. Vandeman and Linda K. Duncan. Mr. Vandeman and Ms. Duncan were asked by the defendant to work out an immunity deal with the Securities and Exchange Commission. Through a series of negotiations conducted between March, 1973 and July 1973, Mr. Vandeman and Ms. Duncan worked out an arrangement with the Securities and Exchange Commission whereby the defendant, and his co-defendant Peter D. Polland, could cooperate with the Securities and Exchange Commission and not be charged with criminal offenses. A portion of the final arrangement between the defendant and the Securities and Exchange Commission is found in a letter dated August 2, 1973, but both Mr. Vandeman and Ms. Duncan stated that the letter did not contain the full understanding of Mr. Vandeman, Ms.

Duncan and the defendant that he had been given the equivalent of immunity by the United States Government. The defendant cooperated fully.

In 1976, Assistant United States Attorney A. Howard Matz inquired of the Securities and Exchange Commission about possible cases, and the Securities and Exchange Commission referred him to the materials and testimony accumulated while the defendant was cooperating with the Securities and Exchange Commission. Mr. Matz put together a grand jury investigation and based this indictment largely upon the materials the defendant supplied to the Securities and Exchange Commission under the grant of immunity.

Motions were brought before the Honorable Robert Firth to suppress the materials given to the Securities and Exchange Commission by the defendant and to dismiss the indictment in this case. Both motions were denied on the grounds that (1) there never was a grant of immunity; or (2) even if there was a

grant of immunity the agreement between the defendant and the government was breached when the defendant failed to reveal pertinent information.

Declarations and testimony were filed and presented at the hearings on said motions to dismiss and suppress the indictment in this case by the attorneys for the defendant which did reveal absolute fact to support the defendants claim of immunity granted by the government.

REASONS FOR GRANTING THE WRIT

The Petitioner believes there are special and important reasons for granting the petition because the Court of Appeals in this case has decided an important question of immunity and promises made by the government solely based upon case law only in the Ninth Circuit with the admission they cannot reweigh the evidence in the motions to dismiss and suppress. This decision conflicts with applicable decisions in other more direct Circuit Court decisions, which will be explored by the Petitioner herein. The Petitioner also feels that

the trial court was clearly erroneous in its decision.

1. THERE WAS A GRANT OF IMMUNITY BY THE GOVERNMENT PROMISES AND COMMITMENTS AND RELIANCE ON SUCH. THEREFORE, THE MOTIONS SHOULD HAVE BEEN GRANTED.

The testimony of Mr. Vandeman and Ms. Duncan is clear. In addition to the letter of August 2, 1973, there was a "side deal" wherein the Securities and Exchange Commission attorneys promised the defendant, through his attorneys, he would not be prosecuted. Based upon that representation, the defendant cooperated fully with the Securities and Exchange Commission and revealed to that agency all of his activities in the securities industry.

The S.E.C. attorneys involved denied there ever was a "side deal" but one has to wonder why the defendant, in the absence of a "side deal", would have cooperated so completely with the S.E.C. especially in view of the statements in the August 2, 1973 letter that immunity could not be given. The defendant was told to rely on the advice of his

attorneys and he in fact did.

Following the grant of "practical immunity" as described by his attorney, the defendant proceeded to testify for the S.E.C. and the Department of Justice in matters concerning this case and numerous others. The testimony was given in some cases without counsel present or Fifth Amendment warnings. There were numerous affirmations by the government and counsel of immunity and no criminal prosecution. Mr. Jan Handzlik said he understood if cooperation no criminal prosecution in these cases and he further stated he gave an agreement not to prosecute me and not to advise me of my rights. Mr. Miles Gordon of the government said disgorgement for \$55,000.00 was for all securities transactions. He also said that if the defendant does not pay the entire disgorgement the government deal might be tainted and diminished. Mr. Hartman of the S.E.C. said that he was never inclined to recommend criminal prosecution. He further stated

that Dizon was always available to answer questions. Then Mr. Hartman said the Vandeman proffer did not constitute criminal culpability. Finally, Mr. Hartman said he did make a deal with Dizon in August of 1973. Mr. Joel Levine, another government agent said that Dizon's attorney Ms. Duncan understood that the Securities and Exchange Commission granted immunity in her presence and that she always maintained her position. Levine further said he met with Dizon without counsel, gave no Fifth Amendment warnings and Dizon answered all questions. Finally, Levine said he understood the restitution was part of the Securities and Exchange Commission deal and if all money was not paid he might recommend prosecution. The government did in fact use pressure to collect the remainder of the restitution. It appears bizarre and incredible that the defendant would have done all of these things if he were relying solely on the very limited terms of the August 2, 1973 letter. It is

suggested that the Court reviews the testimony of Mr. Vandeman and Ms Duncan as to their understanding of the government immunity deal. They certainly have no reason to protect the defendant in any manner whatsoever.

The testimony of the government attorneys is not believable. The testimony of Mr. Vandeman and Ms. Duncan tells the true story. The defendant did rely on the numerous representations made by his attorneys and the government. The government attorneys by their own admissions in testimony admit there was a grant of "practical immunity".

Since the government made a promise of no prosecution in return for full cooperation, the government must be held to its promise. In United States v. Minnesota Mining & Manufacturing Co., 551 F.2d 1106 (8th Cir., 1977) the court held there was an unwritten agreement and implied that some charges could not be used at a later date. The court also held there does not have to be an explicit agreement and the defendants

acted in reliance upon an agreement made with the company attorneys. As in this case I also acted in reliance upon an agreement to my detriment in performing the conditions required by the government.

In United States v Carter, 454 F. 2d 426 (4th Cir., 1972) the court held a defendant would not be prosecuted for a commission of the crimes she divulged.

"Nonetheless, we conclude that if the promise was made to defendant as alledged and defendant relied upon it in incriminating himself and others, the government should be held to abide by its terms."

In United States v Rand, 308 F. Supp. 12-31 (N.D.Okla., 1970) the court found that "common sence" dictates the finding and facts were elecited from a defendant believing he was immunized from prosecution. The court said "every item of evidence elicited from is so tainted that the indictment must be dismissed". The court recognized that parallel proceedings poses delicate problems and there is a need for great care. In this case and in my case the

government used evidence directly from the civil to the criminal hearings.

"The evidence is clear that defendant Rand was, in the circumstances, compelled to testify against himself. The court also finds: (1) There was an immunity; (2) Defendants were entitled to rely on it; (3) The immunity covered all "matters introduced" at the civil trial; (4) The S.E.C. matters testified to are within the scope of "matters introduced" language of the immunity; and (5) Use of such evidence elicited would violate the immunity granted.

In view of these findings, the conclusion is inescapable that there must be an end to this litigation. To simply suppress the evidence which the Government obtained by the methods explored above would not be sufficient to remedy the violation of defendant Rand's constitutional rights. Accordingly, the indictment is dismissed.

The foregoing constitutes the Court's findings of fact and conclusions of law."

In United States v. Phillips Petroleum, 435 F Supp. 662 (D.Okla., 1977) the Court found:

"1. When the United States Government gives its word to or makes an

agreement with one of its citizens, the Government must be held to that agreement and keep its promises. The United States Supreme Court held in Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L. Ed.2d 427 (1971), that where a plea of guilty by a defendant rests in any significant degree upon the promise or agreement of the Government, such promise must be fulfilled. The most meticulous standards of both promise and performance must be met by prosecutors engaged in negotiating such agreements."

In United States v. Pavia, 294 F. Supp. 742 (D.C.D.C. 1969) here the Court said:

"District court would presume only the highest standards of fair play and ethical conduct on part of United States attorney in criminal prosecution."

"(10) Finally, the Government argues that Paiva did not abide by the agreement. It asserts that he "hedged" on his performance by not identifying bonds he had forged, by not supplying handwriting exemplars and by requesting release on special recognition. The Court finds these assertions either contradicted by the testimony or irrelevant."

We can substitute the S.E.C. for the

the United States Attorney in this Writ. Certainly the performance herein and the continuous pattern of Government promises is much stronger in this case.

In United States v. Rodman, 519 F. 2d 1058 (1st Cir., 1975) this case is the most relevant because it deals with S.E.C. promises. The S.E.C. promised to recommend that the defendant not be indicted where information was furnished. The indictment was dismissed on the grounds that the S.E.C. had obtained substantial information including self-incriminating statements from the appellee on the basis of a promise. Here the defendant was induced to give statements to the S.E.C. The Court held that the S.E.C. was unfair and warranted dismissal. In both this case and in the Writ herein agreements were made with the attorneys for the defendants. This Writ shall enclose the following statements made by this Court:

"The Court of Appeals held that where district court found on ample testimony that the Securities and Exchange Commission had agreed, in return for information furnished

by defendant, that it would be recommended that defendant be not indicted, and where information was furnished, the district court did not abuse its discretion in finding that fairness required dismissal of indictment. Affirmed.

There was documentary support, in the form of notes on the information provided by the appellee and the indictments. It was also the testimony of appellee's former counsel that he and his client appeared for purpose of giving evidence at one of the trials, but that the case was settled out of court. Any failure to provide further aid to the SEC was apparently deemed irrelevant to the agreement as the district court interpreted it.

The court found that "defendant Rodman was induced to give statements to the SEC upon representations that Mr. Riccio would make a recommendation that he not be indicted, that he did make some statements of a fairly extensive nature; and not only did Mr. Riccio not make such a recommendation, but at the time of these statements he was actively contemplating the preparation of a criminal reference report which would have included the defendant Rodman"

In the interest of fair play, taint, the

sacred word of our government and ethical standards of our system I suggest a review of the evidence would show the true picture of this chain of promises and inducements on behalf of the government. Only a review of the facts in the Motions to Dismiss and Suppress would be necessary to find the truth which is supported by the cases cited herein. Therefore, the motion to dismiss and the motion to suppress should have been granted. The failure of the Court to grant the motions requires the reversal of the instant case.

2. THERE WAS NO BREACH OF AGREEMENT WHICH WOULD NULLIFY THE IMMUNITY AGREEMENT.

Because Judge Firth based his ruling in the alternative, the defendant must address the issue of the breach of agreement. It is the position of the defendant that there was no breach of the agreement with the S.E.C.

The United States Attorney based his argument about the breach on the contention that after the defendant, through his attorneys, had entered into negot-

iations with the S.E.C. in March, 1973 he and others entered into a transaction ("Zitron Transaction") in April, 1973 and that this transaction was (1) in violation of the agreement between himself and the S.E.C.; and (2) was not revealed to the United States government. The defendant urges that both of these contentions were wrong for the following reasons.

First, the agreement between the defendant and the S.E.C. was not entered into until August, 1973 when the letter dated August 2, 1973 was mailed to his attorneys. Prior to that time, there was no agreement between himself and the S.E.C. Therefore, if there was a transaction in April, 1973, it could not be in violation of any agreement between the defendant and the S.E.C.

Second, the "Zitron Transaction", or at least its outline, was revealed to the S.E.C. in July, 1973 when Mr. Vandeman made an oral proffer to the S.E.C. In both his declaration and his testimony, Mr. Vandeman stated that the outline of the "Zitron

Transaction" was in the proffer given by him to the S.E.C. in July, 1973. Therefore, if Mr. Vandeman included the "Zitron Transaction" outline in the proffer, he must have known about it, and the only way he could have known about it was if the defendant had told him. Further, if Mr. Vandeman put the outline of the "Zitron Transaction" in the proffer, he, on behalf of the defendant, did reveal the essentials of the transaction to the S.E.C. and it was up to the S.E.C. to follow up on the information provided. Dizon was to disclose possible types and ranges of criminal activities - not necessarily all-inclusive and then the government could inquire further about each transaction. The defendants activities numbered in the thousands of securities transactions and the government just didn't have the time or desire to follow-up on each and every securities transaction. The government did not ask about this transaction until after July, 1976

and then the defendant did testify in grand jury hearings about the transaction.

The government breached the S.E.C. agreement and still denies it. Attorney A. Howard Matz, the prosecutor, said he had personal meetings with Mr. Erickson of the S.E.C. and Mr. Erickson suggested he look into the All American Fund and then call Mr. Miles Gordon of the S.E.C. for more information. Mr. Matz agreed to investigate upon the Erickson referral and in fact called Mr. Gordon on July 18th for more information and then met with Mr. Gordon. Mr. Gordon told Attorney Matz he would help him investigate "a good case thats' my reaction in July 1976". The two attorneys meet in person and they also talk about the defendant in reviewing the files.

Therefore, the defendant did not breach his agreement with the S.E.C. and Judge Firth was in error when he found as his alternative ground for denying the motions that there was a

breach. In fact, the government, themselves, breached the agreement.

The case law shown herein and the facts as related in the motion to dismiss clearly show that the trial court judge was absolutely erroneous in his finding, therefore, this court should re-examine this matter.

CONCLUSION

It is respectfully submitted that this Court, in the exercise of its supervisory powers over the Federal courts below, and because of the important Constitutional issues involved, should grant the petition and order the writ of certiorari to issue.

Respectfully
submitted,

JAMES DIZON
In Propria Persona

APPENDIX A



NO. 77-3784
NO. 77-3866
NO. 78-2462

COURT OF APPEALS
F I L E D
MAY 18, 1979
Emil E. Melfi,
Jr., Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
JAMES DIZON, KAY HARRISON
Defendants-Appellants.

- - - - -

On Appeal from the United States District
Court for the Central District of California

- - - - -

MEMORANDUM

Before: BROWNING and CHOY, Circuit
Judges, and EAST,* District
Judge

Statement of the Case

Appellants James Dizon and Kay
Harrison were each convicted of conspir-

*The Honorable William G. East, Senior
United States District Judge for the
District of Oregon, sitting by designation.

acy (18 U.S.C. 371) to use the mail in employing a scheme to defraud a client of an investment adviser (15 U.S.C. 80b-6), and to convert funds of a registered investment company (15 U.S.C. 80a-36). Harrison was also convicted of conspiracy to cause an affiliated person of a registered investment company to unlawfully accept compensation (15 U.S.C. 80a-17(e)), and to unlawfully effectuate a joint transaction between a registered investment company and an affiliated person of that company (15 U.S.C. 80a-17(d)).¹ Pursuant to a second indictment,¹ Harrison was convicted for conversion of funds of an investment company (15 U.S.C. 80a-36), use of the mail to defraud a client of an investment adviser, and effectuating a joint transaction in violation of the Investment Company Act (15 U.S.C. 80a-17(d)). They appeal from these convictions. We affirm.

1. Sufficiency of the Evidence

Appellants Dizon and Harrison (in both cases) argue that the evidence presented was insufficient for the jury to find them guilty and, therefore, the district court should have directed acquittals. However, in United States v. Jones, No. 78-2267 (January 29, 1979), we held that if "the evidence, considered most favorably to the government, was such as to permit a rational conclusion by the jury that the accused was guilty beyond a reasonable doubt", we must affirm the jury's verdict. Having carefully re-

viewed the records, we find that the evidence relied upon by the jury was sufficient.

2. Testimony of a Co-Defendant's Guilty Plea

Dizon contends that the district court committed error in admitting testimony of co-defendant Polland's guilty plea, since there were factual differences between his case and Polland's and because such evidence would permit the jury to assume the existence of facts not actually proved at trial. Moreover, Dizon claims that the trial court should have given a cautionary instruction to the jury that they were not to draw an inference of guilt based upon Polland's plea, notwithstanding the fact that no instruction was requested by defense counsel.

We conclude that Polland's plea of guilty was admissible as the Government is entitled to elicit even damaging testimony to avoid creating misleading impressions to the jury. United States v. Rothman, 463 F.2d 488, 490 (2d Cir.), cert. denied, 409 U.S. 956 (1972). In the instant case, the initial inquiry regarding Polland's plea was brief and was made in order to avoid the appearance of keeping something from the jury. Furthermore, Dizon's claim that the district court should have given a cautionary instruction sua sponte is also without merit since the court was under no duty to give one in the absence of a specific request. Id. at 490.

3. Evidence of Prior Conduct

Dizon alleges that the district court erred in admitting evidence of his previous dealings with several other co-defendants involving transactions similar to the ones at issue in this case. Pursuant to Rules 402, 403, and 404(b) of the Federal Rules of Evidence and on the basis of the evidence presented, the district court did not abuse its discretion in admitting the evidence as relevant to the issue of a common scheme or motive.

4. Government Witness' Use of Cocaine

Dizon claims that it was improper for the trial court to exclude testimony concerning a government witness' use of cocaine on prior occasions as a basis for impeaching his credibility. We disagree. Such testimony would have been unduly prejudicial to the Government's case and embarrassing to the witness. See Fed.R. Evid. 611. Furthermore, since an evidentiary hearing established that the witness' use of cocaine had no negative effect on his ability to perceive, recall or relate events, the evidence had little or no probative value. Thus, there was no abuse of discretion in excluding the testimony.

5. Double Jeopardy Claim

Harrison contends that all her convictions in the second trial should have been dismissed for double jeopardy,

since they had previously been tried in the first case. The district court granted her motion as to count one (conspiracy) but refused to do so for the remaining charges. We agree. First, to the extent that Harrison's double jeopardy complaint is aimed at successive prosecutions under the same statutes for different transactions that were allegedly part of a "single conspiracy", the standard set forth in Blockburger v. United States, 284 U.S. 299 (1932),^{2/} is dispositive of the claim. The statutes under which Harrison was charged were aimed at separate transactions, and an overall "business" or pattern of such transactions cannot insulate her from separate liability for each illegal transaction. Second, to the extent that Harrison's double jeopardy challenge can be read as an attack on a conviction for "substantive" offenses as well as for conspiracy, the "different element" rule would eliminate this contention. Id. at 304. It is well-settled that convictions may be had for both a conspiracy to commit an act and the substantive crime involving that act. See United States v. Carmen, 577 F.2d 556, 567 (9th Cir. 1978). In the instant case, an agreement to conspire was not an element found in the "substantive offenses" of which Harrison was convicted in the second trial. Therefore, no double jeopardy is involved as to the remaining charges.

6. Severance Issue

Upon the district court's granting of a dismissal as to the conspiracy count in the indictment, Harrison contends that due to the nature of the evidence which would be heard by the jury, namely, that conspiracy has also been charged against other defendants, her motion for severance would have been granted because she could not otherwise have had a fair trial. A denial of a motion for severance does not warrant reversal in the absence of a showing that there was an abuse of discretion. Opfer v. United States, 348 U.S. 84, 94-95 (1954). Since Harrison has not demonstrated that the jury could not comprehend the lower court's cautionary and limiting instructions, or that she was unduly prejudiced, there was no abuse of discretion. Id.

7. Immunity

Dizon argued to the district court that negotiations between his counsel and the Securities and Exchange Commission resulted in his being granted immunity from prosecution in exchange for his cooperation with the Government. After a hearing, however, the district court found that there was no such grant of immunity. Additionally, the district court found that had there been such a grant, it would have been rendered invalid because Dizon breached his understanding with the Government and his obligations thereunder.

Dizon now argues that there was

testimony before the district court from which one could conclude that there was an immunity agreement and that he did not breach his obligations. Because, however, Dizon does not show that the district court was clearly erroneous as to either finding, we cannot reweigh the evidence. See United States v. Martin, 587 F.2d 31, 33 (9th Cir. 1978); United States v. Hood, 493 F.2d 677, 680 (9th Cir.), cert. denied, 419 U.S. 852 (1974).

AFFIRMED.

ENTERED FOR THE COURT:

EMIL E. MELFI, JR. /s/
Clerk of Court

Footnotes

1. (reference on page 2)

The foregoing appeals arose out of two separate trials in different courts and have been consolidated.

2. (reference on page 4)

In Blockburger, the Supreme Court indicated that separate sales transactions (in narcotics) were subject to separate and successive prosecutions. The Court distinguished "continuous offense" type crimes, such as cohabitation, from offenses which were separate, like sales of narcotics at different times to different people. Hence, the Court stated:

The Narcotic Act does not create the offense of engaging in the business of selling the forbidden drugs, but penalizes any sale. . . . Each of several successive sales constitutes a distinct offense, however closely they may follow each other.

Id. at 302.